> For our part we do not find the squabbles of its council of any great interest. The real truth of the matter, it seems to us, is that the activity of the Zoological Society has outlived its usefulness so far as a public asset is concerned . . . The simplest way out is for control of the Gardens to be transferred, voluntarily or otherwise, to the State . . .

That, of course, is what happened. The working party recommended that part of Ashton Park be transferred to the ownership of a body called "The New Zoological Gardens Trust" and an agreement was reached with the Council of the Society that it would pass over its animals and buildings and that on 31 June, 1916, all staff would be dismissed, to be employed the following day by the Trust. Le Souef had been transferred to the Trust in 1912, first as its Secretary, then Director, and was able to mastermind the development of Taronga.

In retrospect, the transition was very gentle, for five Councillors of the Society were made members of the seven-member Trust; members of the Society were given free entry to the Zoo (plus a number of free passes); and it was agreed that the Zoo would provide accommodation for the Society's meetings, its library, and its research activities — none of which were substantial.

This is the point at which I regard the "early" history of the Society as coming to an end. In review, what happened was that the 1852 attempt to establish an educational-scientific zoo failed. The outcome of the Acclimatization Society (1861) was that a zoo became established in the Botanic Gardens. The Zoological Society (1879) was high-jacked by Bennett, Holroyd and Moore to create a zoo but this had little zoological content. Mörner's revolution came too late and we were left with a Zoological Society with some claim to be zoological but without a zoo.

One could well imagine that this would have been the end of the story and that the Zoological Society would have followed the Acclimatization Society into decline but this was not the case. The biologists in control of the Society transformed it into a scientific body and, in 1913, published the first issue of *The Australian Zoologist*. Triumphs and failures over the next 80 years constitute the "later" history of our Society. I hope to have the opportunity to sketch this at some future gathering.

Environmental Dispute Resolution

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(An address by the Rt Hon. Sir Ninian Stephen, Ambassador for the Environment [from July 1989 to September 1992] to a National Conference on public issue dispute resolution sponsored by the Queensland Government in conjunction with the Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region, held at the Sheraton Brisbane Hotel on Tuesday, 19 February 1991.)

I want to take the opportunity that this gathering offers to have a look at the whole question of the modern phenomenon of environmental disputes, to discuss the features that seem to me to mark them out as entirely different in nature from disputes that are litigated in the courts of law and to suggest some conclusions about processes suitable for resolving or, better still, in some cases altogether avoiding environmental disputes. I should make it perfectly clear at the outset that I speak entirely for myself and that nothing that I say in any way reflects the views of the Commonwealth. Not only are these my own views, they are put forward with no concluded conviction as to their correctness or, especially, as to their feasibility but, rather, so as to provoke discussion, at a quite fundamental level, on the topic of environmental dispute resolution.

Any form of dispute resolution is itself a second-best solution; dispute avoidance is clearly preferable. And what may loosely be described as environmental disputes do seem to me to be at least occasionally susceptible to avoidance techniques, as I will suggest in the course of looking at dispute resolution processes. But first a look at the nature of environmental disputes, that is, disputes in which environmental factors can be seen to play a significant part. Such disputes seem to me to be essentially

different from the disputes that down the ages have been the concern of the traditional dispute resolution mechanisms in place world-wide in the shape of courts of law in all their various forms. Contrasting the two emphasizes the quite special character of environmental disputes.

Various as are the different legal systems of the world, they all do seem to involve a common concept; the concept of a body of principles which will guide members of the community in their conduct and against which any conduct complained of will be measured, principles capable of being applied to the particular facts of individual cases and which, when so applied, are intended to produce a result consistent with a particular community's conception of justice.

Not so with environmental disputes. The most striking thing about them is the absence of any such general body of principles. There exists no great corpus of law by reference to which these disputes should be resolved so that, when resolved, all parties to the dispute will be left feeling, if not content, at least with the sense that established principles which have gained community acceptance have been applied in their resolution.

That this should be absent in environmental disputes is not at all surprising. On the contrary, it would be extraordinary if any such general body of principles, ready for application to particular cases, did already exist. We are, after all, still in the infancy of our experience in resolving such disputes, and this because we are, for the very first time, now subjecting human activities to examination from a quite novel perspective; a perspective forced on us by the realization that the resources of the globe that make life on earth possible are finite and that mankind's exploitation of these resources, if continued to be given free rein, may reduce earth to a sterile waste-land. Not only is this perspective new but it is one that, as yet, necessarily involves much imprecision and many unknowns.

The general corpus of both civil and criminal law in most countries of the world has had many centuries in which to develop; and it has developed to meet relatively straightforward community needs, needs such as the protection of life, limb and property, the preservation of public order, the sancity of contract and the enforcement of compensation for harm done by one to another. In complete contrast, the public issues involved in environmental disputes are not only novel in the sense that they were not understood as existing as issues at all even 50 years ago; they are also usually of high complexity. They do not at all lend themselves to apparently simple answers, as does the question, for instance, "Should a man suffer for harming another?" Of course, even that apparently simple question can become complex indeed because of the extraordinary variety of fact situations and states of mind of which mankind is capable of producing. For instance, a person may harm another with premeditated intent, or intentionally but in self defence, or under provocation, or while mentally deranged, or unintentionally but recklessly, or perhaps only negligently. But at least for each of these situations the law has, in most advanced justice systems, devised principled approaches.

In environmental disputes not only are there no such relatively sophisticated principles in place, the questions themselves frequently will not be such as to evoke what, at least at first sight, seems an obvious answer. Instead, even the initial, unconsidered response, before the true complexities have been understood, may well vary from person to person. Concepts of what is morally right and fair, which, of course, greatly influence the corpus of general criminal and civil law, will very often provide no immediate answer in the case of environmental disputes. Such a dispute may present itself, on the surface, as no more than one between economic growth or development on the one hand and conservation on the other, but it will usually be misleading to see it solely in those terms and in any decision-making process a great variety of factors, many uncertain, some unquantifiable, will arise and should affect the outcome.

Take, by way of a not very imaginative example, the case of a dispute over the proposed construction of a dam designed for power generation and that will flood a valley at presently partly wilderness area and partly devoted to agricultural uses. Confronting any dispute resolution mechanism will be a host of diffuse and debatable issues. They will include: the predicted future demand for the power that the dam will generate; what new industries the availability of that power will attract; whether to attract those industries is, on balance, desirable having regard to employment generation, wealth production, pollution, associated infrastructure costs, impact upon local lifestyles and so on; whether new hydro power potential will significantly contribute to reduced consumption of fossil fuels and hence of greenhouse gas emissions; what will be the useful life of the dam having regard to possible siltation and to changing technologies; the

dam's effect on downstream river flows; even the risk of overtopping or disastrous collapse in exceptional downpours and the possibility of climate change altering the water potential of its catchment area.

Then there will be questions of the value to the community of the existing wilderness area for recreation and tourism; the extent to which the resultant new lake and creation of new access roads will themselves provide new recreational facilities; the national and perhaps global value of the existing wilderness both for its own sake as unspoilt wilderness and as a species habitat, which in turn raises issues about the species of fauna and flora found in the locality and whether they are unique or endangered. Then, the flooding of the agricultural land affected by the proposed dam will raise a whole range of other questions, some relating to the best economic use of the land; its suitability for agriculture having regard to world markets for its products and their relative costs of production; the disruption of the agricultural community that farms the land and so on. Were the dam also to be used for irrigation one can imagine a host of still further considerations that would arise.

There is no need to elaborate upon other possible issues that might prove relevant. It must already be clear not only that to arrive at any reasoned decision would be no simple matter but also, and more immediately relevant, that it would not involve anything approaching the traditional judicial process of applying existing principles to found facts.

This example of a proposed dam construction is chosen quite at random. Innumerable others would serve equally well, all the way from resort hotels on pristine water frontages to new airports to better serve capital cities; from mining in parklands to the preservation of uneconomic yet culturally significant city buildings. Each will pose different problems. All will be complex of resolution if sought to be resolved in a way that takes account of all reasonably relevant factors. All will be subject to the same problem of the absence of general principles to apply in their resolution.

Two conclusions seem to me to flow from all this. The first, a negative one, is that our traditional court system is quite unsuited to the satisfactory resolution of such disputes. It already plays a vital role in our system of criminal justice and in the field of civil litigation, and has proved itself capable of adapting, sometimes expanding, the principles that guide it, so as to cover new situations and changing social attitudes, but always within the framework of the existing, established corpus of the law. It should not be called upon to function in areas where there exists no such established body of law, in particular not in areas involving broad policy-making, something that seems inherent in environmental dispute resolution. Neither its methods nor its skills are adapted to that task; moreover, to embark upon it would be to impair its acceptability as an impartial instrument of justice in its traditional areas of jurisdiction and, would, in particular, jeopardise the very valuable principle of judicial independence, a principle that is scarcely consistent with the role of a policy-oriented decision maker.

My second conclusion is that the great need, in the case of environmental disputes, is for the framing of some general body of principles which will provide mandatory guidelines for the resolution of environmental disputes. And in a democratic society it must be the responsibility of government to develop that body of principles, which appropriately composed tribunals can then apply as guidelines, case by case. Why there is this need and how it can best be met calls for some examination of the process of resolution of environmental disputes.

There will be at least two levels of decision making in resolving such disputes. The first level will involve both extensive fact-finding and also the getting of much expert opinion on matters that involve not so much the establishment of facts as the making of informed assessments, whether scientific, sociological or economic. By those processes conclusions can be arrived at on each of the many factors that affect, in one way or another, the proposal that has given rise to the dispute. But that will do no more than provide an answer to each of the many questions which are seen as bearing upon the ultimate decision.

The next level will involve the attaching of degrees of weight to each of those answers. For instance, suppose that in my example of the dam it is found as a fact that the wilderness area threatened with flooding does contain a number of species of flora and fauna and that expert opinion is that they are unique to that area. Suppose, too, that it is found as a fact that there has long been widespread youth unemployment in the district, that it has been accentuated by the lack of any adequate, low-cost energy source for industry and that expert opinion is that environmentally acceptable and labour-intensive industry would be attracted to the district by what would be cheap new sources of hydro power. No amount of

investigation or enquiry is going to much assist in deciding what respective weights are to be given to these two conclusions, each pointing towards a different resolution of the dispute. In practice, of course, it will not be two conclusions but many more that will have to be weighed. Yet only by the attribution of appropriate weight to each of the many findings of fact and assessments of expert opinions will it be possible to reach a proper decision on whether the dam should or should not be built.

This matter of weighing the importance of these many factors seems to be inherently one of public policy-making, appropriate in our democracy only to government. It should reflect the degree of importance that government, responsive as it must be to the views of the electorate, attaches to each of the factors upon which findings have been made; whether, for instance, youth unemployment is in all the circumstances of time and place more or less significant than species preservation and how each measures up alongside all the other relevant factors.

Of course, no level of government, whether local, state or federal, could be expected to attempt directly to involve itself in this process in the case of each dispute; that will have to be the work of tribunals. What governments can do, however, is to provide guidelines in the form of detailed policy statements which will, as explicitly as possible, indicate the respective degrees of importance which should be attached to the more important and more universely applicable factors likely to arise in such disputes.

This would, in practice, not be so demanding a task as at first sight my example of the dam may suggest. It would not be any question of stating degrees of importance of particular factors, factors which will, of course, differ in detail in every case. It would, instead, call for as explicity as possible an evaluation of how government sees the relative importance of key factors, economic, social and environmental, likely to crop up time and again in environmental disputes. It would amount, in effect, to a statement of the relative priorities of government, its policy on the two great issues of development and conservation. The processes of extrapolation and analogy should then ensure that the critical weighing of factors by a tribunal would, in fact, reflect the priorities set out in the policy statement.

The prime purpose of such policy statements would be to provide explicit and mandatory guidelines for tribunals to follow in arriving at a final resolution of disputes. But they would also serve other important purposes.

At the stage when political parties were each preparing their own version of such policy statements, each knowing that its set of declared priorities would have an impact on the outcome of the next election, they would be acutely sensitive to representations from the whole range of interest groups, environmental and otherwise. The details of these policy statements would be a prime focus of attention for those interest groups and for all others likely to be involved in future disputes, since all would know that it would be by reference to the particular version put forward by the party in fact elected to govern that for the next few years environmental disputes would be determined.

The framing of the policy statement would concentrate the political mind on the issues of development and conservation and their reconciliation. Political parties would be eager for their policies to find favour with the electorate. At the same time, the knowledge that attaining office would mean living with the policy until the next election would make for realistic policy statements.

Hammered out under all the pressures of pre-election lobbying and debate, the successful party's publicly declared policy would, as a matter of law, provide the obligatory guidelines for the decision of all environmental disputes. Tribunals resolving such disputes, after making their findings of fact and assessments of expert opinion, would have to follow those guidelines in taking the next and final step of making a final decision, giving to each factor the significance that they considered it should bear having regard to the government of the day's policy statement.

The policy statement would, for the time being, constitute that corpus of principles presently so notable by its absence in environmental disputes. Because of its subject matter it is entirely appropriate that that corpus should be a political document, in effect the government's popular mandate in the area of development and conservation. It, and decisions arrived at in accordance with it, would be entitled to the legitimacy which is accorded to electoral success.

Were there a change of government at the next election, or perhaps the same party in power but with a modified policy, the corpus of principles would change accordingly. But that would be precisely what would be expected of principles which were essentially

policy-oriented, consisting of what were seen by the government of the day to be good policy for the time being.

It may be thought that such a system, determining once and for all by reference to the government of the day's policy statement the guidelines to be applied throughout that government's term of office, is too inflexible in an area as yet so little explored as the reconciliation of development with conservation. If so, it would be possible to achieve a degree of flexibility, albeit at the price of some legitimacy and some consistency of decision-making, by providing for amendment of a government's policy statement during its term of office. However, any amendment would require safeguards, such as, for instance, prior public announcement accompanied by explicit reasons, an interval during which public reaction could be gauged and, perhaps, opportunity for debate of the amendment in the legislature.

I mentioned earlier the high desirability of initial avoidance, as distinct from subsequent resolution of environmental disputes and nothing is more likely to help in the initial avoidance of disputes than clear advance knowledge of what are the government's priorities and policies in the area of development and the environment. Developers will better know where they are likely to stand and so will environmentalists. Each will be able to shape their own plans accordingly, discarding forlorn hopes and concentrating upon support or opposition in appropriate cases, with a fair degree of predictability having been introduced by the knowledge of what are the priorities that the policy statement spells out and that the relevant tribunal will be bound to apply those priorities to the facts it finds.

The preparation and publication of such policy statements would also have the virtue of openness and the benign effect of focusing the pressure of interest groups where it rightly should be applied — upon government's statement of environmental policy. The need for governments to, as it were, declare their hand in this way by means of detailed policy statements on development and the environment would, of course, make preparation of policy statements a difficult and sensitive task but that is precisely what it should be when so much is at stake.

I have in mind that it would, of course, not only be those concerned with development and growth whose proposals would be subject to this process of dispute resolution. The proposals of environmentalists, for the creation or extension of national parks, for the better protection of endangered species, for the prevention of river pollution, for the preservation of forests and so on would also be subject to the process.

As to the kind of tribunal that should resolve such disputes, the question of process, as I have described it, and which I regard as being dictated by and flowing from the particular nature of these disputes, is, I think, more important than the nature and composition of whatever tribunal is created to determine such disputes. However, that it should be determined by a tribunal is, I would suppose, not contentious. Its members should not, I think, have judicial tenure but be appointed for, say, seven-year terms; retirement dates being staggered so that a degree of continuity of experience is maintained. Membership should not attempt to be representative of particular interests but should consist of members with skills in relevant areas of science, in law, in economics and in sociology.

Two important features would be the legal character of the tribunal's decisions and the means of access to the tribunal. Its decisions should not, I think, be merely recommendatory in character; instead they should have the force of law subject only to this qualification: that if implementation of a decision involved legislation, the legislature would have to remain its own master; so that, if it should chose the perhaps perilous course of doing so, it would be free, regardless of the tribunal's decision, to legislate or not, as it saw fit.

I would also be reluctant to see any form of appeal from decisions of the tribunal. It should be required to publish full reasons for its decisions, showing what were its finding of fact and assessments of expert opinion and how it had then applied to them the government's policy statement. The concept of appeals is deeply rooted in our thinking; it is an important feature of most developed systems of law. However, it has little currency where policy decisions at the political level are in question. No doubt an appeal system could apply to a tribunal's finding of fact and assessment of expert opinion and to the correctness of its understanding and implementation of policy guidelines. But on balance I do not favour it. To add to the already complex process an appeals system seems to me unlikely to produce a necessarily better outcome while greatly adding to both cost and delay.

Access to the tribunal should not, I think, depend upon reference by government. It

should be open to any party claiming to be affected by a particular proposal in which environmental factors could be seen to play a significant part and to which it was opposed to raise a dispute and bring it before the tribunal. If for some reason parties to such a dispute chose not to refer it to the tribunal, government should no doubt also have the power to do so.

It would, of course, be open to a tribunal, and indeed might become a common outcome, not simply to decide in favour of one party or the other but instead to give a highly qualified decision. Thus a particular proposal might not simply be approved or rejected outright but could instead be approved subject to a full range of specified modifications or conditions.

Throughout I have referred to government without drawing any distinction between state and federal governments. Clearly, it would be for each level of government to constitute its own tribunal and each tribunal would look to and be guided by the current policy statement of the particular level of government by which it was created. It is not inconceivable in our federal system that priorities of the governments of different states might at any one time be widely different. This would be of concern only in a dispute involving several states — for instance, involving the waters of the Murray River. I do not propose to attempt the resolution of such a difficulty; it would require the exercise of all the wisdom and good sense conjured up by the phrase "co-operative federalism". So too if a dispute involved both a state and the federal government. There might then be conflict as to the jurisdictions of each government's tribunals. In fact, difficulties of this sort are not novel in our federation and have not proved insurmountable in other areas in the past. With a modicum of co-operation between governments, they should be capable of resolution.

This, then, is my very tentative solution to what I see as the principal, and largely unexplored, problem of environmental dispute resolution — namely the absence of clear policy guidelines by reference to which disputes can be resolved.

What I have proposed, of course, involves a quite substantial departure from present practice; environmental impact assessment processes as they at present operate play no part in it, nor does the setting up of tribunals of various kinds whose function is only to enquire and report. Instead, it seeks to make use of a suitably composed tribunal as a fact-finding instrument, inserts government policy into the process once facts have been found, but places the ultimate decision in the hands of the tribunal, leaving to it the task of interpreting the statement of government policy and ensuring that it is reflected in its decision. It also places squarely upon governments the obligation, and the power, to declare what shall be policy for the time being in development and conservation issues. This I see as its merits. I would welcome discussion of its demerits, some of which I am all too aware of.